UNITED OVERSEAS BANK MALAYSIA BHD

v.

GAR FOH LAND SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S5-24-2881-2001]
12 MARCH 2001

CIVIL PROCEDURE: *Stay of proceedings - Application for - Payment of costs pending - Whether special circumstances shown to warrant stay - Applicability of Palaniappan v. Ramanathan & Ors - Principles laid down in Martin v. Earl Beauchamp and James M'Cabe (Pauper) v. The Governor and Company of the Bank of Ireland*

The defendant applied to stay the foreclosure proceedings filed by the plaintiff, pending payment of costs by the plaintiff to the defendant in relation to an originating summons S2-24-3172-2000 (the "S2 matter"). In the S2 matter, the same plaintiff filed a similar foreclosure proceeding against the same defendant with regards to the same subject matter, and the learned judge in that case had dismissed it with costs.

Held:

[1] In *Palaniappan v. Ramanathan & Ors*, the court held that where the plaintiff having failed in an action commences a second action for the same matter, the second action must be stayed until the costs of the first action had been paid. In arriving at this decision, the principles as laid down in *Martin v. Earl Beauchamp* and *James M'Cabe (Pauper) v. The Governor and Company of the Bank of England* were applied. Following these solid legal authorities, the defendant had shown special circumstances to warrant a stay of foreclosure proceedings pending the disposal of the issue of costs in the S2 matter. (pp 690 f, 691 b, c & 696 h)

[Application allowed.]

Case(s) referred to:

Adam & Harvey Ltd v. International Maritime Supplies Co Ltd [1967] 1 All ER 533 ***(refd)***

Allied Collection Agencies Ltd v. Wood [1981] 3 All ER 176 ***(refd)***

Beckley v. Colley [1904] 48 Sol Jo 261 ***(refd)***

British Natural Premium Provident Association v. Bywater [1897] 2 Ch 531 ***(refd)***

EMI Records Ltd v. Ian Cameron Wallace Ltd [1983] Ch 59 ***(refd)***

Gardner v. Marshall [1845] 14 Sim 575 ***(refd)***
Gibbs v. Gibbs [1952] 1 All ER 942 ***(refd)***
Hines v. Birkbeck College & Anor (No 2) [1991] 3 WLR 557 ***(refd)***
How v. Earl Winterton (No 4) [1904] 91 LT 763 ***(refd)***
James M'Cabe (Pauper) v. The Governor and Company of The Bank of Ireland [1889] HL vol XIV, 413 ***(foll)***
JT Stratford & Son Ltd v. Lindley (No 2) [1969] 3 All ER 1122 ***(refd)***
Martin v. Earl Beauchamp [1883] Ch D vol XXV 12 ***(foll)***
Mohan Singh v. Malkiyat Kaur [1978] 2 MLJ 181 ***(refd)***
Palaniappan v. Ramanathan & Ors [1972] 1 MLJ 227 ***(foll)***
Re Hodgkinson, Hodgkinson v. Hodgkinson [1895] 2 Ch 190 ***(refd)***
Silver v. Silver & Greenfell [1924] P 163 ***(refd)***
Smith v. Buller [1875] LR 19 Eq 473 ***(refd)***
Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram (No 2) [2002] 1 CLJ 609 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 41 r. 9(2), O. 59 rr. 1(1), 4(1), 27(2)

For the plaintiff - Wong Ming; M/s Zairina Loh & Wong
For the defendant - Kuan Chee Foo; M/s RM Abdullah, Kuan & Assoc

Reported by Raja Vishnu Sivarajah

JUDGMENT

Abdul Malik Ishak J:

Facts Of The Case

This was the defendant's application in encl. 9 to stay the foreclosure proceedings in enclosure one (1) that was filed by the plaintiff pending the payment of costs by the plaintiff to the defendant in relation to an originating summons number S2-24-3172-2000 (hereinafter referred to as the "S2 matter"). In the S2 matter, the same plaintiff filed a similar foreclosure proceeding against the same defendant in regard to the same subject matter and the learned judge in the S2 matter had, on 5 July 2001, dismissed it forthwith with costs. It transpired that the learned judge in the S2 matter had made that order in view of the defective supportive affidavit which contravened O. 41 r. 9(2) of the Rules of the High Court 1980 ("RHC"). There was no appeal against the decision of the learned judge in the S2 matter.

Following the dismissal of the plaintiff's suit against the defendant in the S2 matter, the defendant proceeded to file an application to tax the costs against the plaintiff in the S2 court. The learned deputy registrar of the S2 court heard the taxation matter and reserved her decision to 19 March 2002 pending written submission.

Issue Of The Day

The defendant was not asking for the dismissal of the plaintiff's foreclosure proceeding in enclosure one (1) but rather the defendant by way of enclosure 9 was merely asking for enclosure one (1) to be stayed until the issue of costs in the S2 matter has been ascertained and settled. Must I allow encl. 9? That would be the crucial issue to determine.

Decision Of The Court

The costs of the former suit – namely, the S2 matter had not been paid and the plaintiff now proceeded with the second suit for the same matter in this S5 action. The defendant was desirous to stay the present S5 suit pending the disposal of the issue of costs in the S2 matter. A similar situation also arose in *Martin v. Earl Beauchamp* [1883] Ch. D vol XXV, 12, and the Court of Appeal (Cotton LJ, and Lindley LJ) ruled that the second proceeding must be stayed until the costs of the former suit had been paid. In a short judgment, this was what Cotton LJ said (see p. 14 to p. 15 of the report):

> This is an appeal from an order of Mr. Justice Pearson staying proceedings in this action until the costs of a former suit have been paid. The present action is by the plaintiff, as administrator *de bonis non* with the will annexed of William Jennens, against Frederick Earl Beauchamp for an account of the estate of Jennens received by some of the former personal representatives of Jennens. The former suit was brought by Joseph Martin as legal personal representative of Elizabeth Bunch, who was alleged to be the sole next of kin of Jennens, against the legal personal representatives of the former personal representatives of Jennens. Joseph Martin having died the suit was continued by the present Plaintiff, as the legal personal representative of Elizabeth Bunch, against Upton and Coe, as representing one of the former representatives of Jennens, and Frederick Earl Beauchamp, as representing the others; and it was dismissed in 1880 with costs, on the ground, as we are informed, that the title of Elizabeth Bunch as next of kin was not proved.
>
> The rule is established that where a plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action have been paid. Here the Defendant is only one of the Defendants in the old suit, but he is sued in the same character as before. The Plaintiff in the former suit sued as personal representative of Elizabeth Bunch, he now sues as administrator *de bonis non* of William Jennens. But though he is not suing in the same character as that in which he formerly sued, he is suing substantially by virtue of the same alleged title. If he recovers any part of this estate from the Defendant he will recover it as a trustee for the estate of Elizabeth Bunch, and I am of opinion that he is to be treated as bringing a second suit for the same matter as the former.

Writing a separate concurring judgment, Lindley LJ said at p. 15 of the report:

> I am of the same opinion. There is some technical difficulty in the case, for the Plaintiff formerly sued as personal representative of Elizabeth Bunch, but now he sues as personal representative of William Jennens. I think, however, that the technical difficulty is not insuperable, and that we are not prevented by it from saying that this is really and substantially a second action for the same matter.

The House of Lords in the case of *James M'Cabe (Pauper) v. The Governor And Company Of The Bank Of Ireland* [1889] HL, Vol. XIV, 413 approved the decision of *Martin v. Earl Beauchamp (supra)*. The headnote to the case of James M'Cabe carried the following legend.

> Where a plaintiff having failed in one action brings a second action for the same cause of action the second action must be stayed until the costs in the first have been paid. And this is the rule in Ireland, as in England.
>
> *Martin v. Earl Beauchamp* (25 Ch. D. 12) approved.

Lord Herschell writing a separate judgment for the House of Lords went straight to the heart of the matter and this was what his Lordship said (see p. 415 to p. 416 of the report):

> The only question remaining is whether the order was right in so far as it stayed the proceedings in the second action until the costs in the first action had been paid. Now, my Lords, I find that it was laid down in a recent case in the Court of Appeal, *Martin v. Earl Beauchamp* 25 Ch. D 12, that 'the rule is established that where a plaintiff having failed in one action commences a second action for the same matter the second action must stayed until the costs of the first action have been paid;' and even although the actions were not between precisely the same parties or persons suing in the same capacity, the case was held to be within the rule inasmuch as the plaintiff there was 'suing substantially by virtue of the same alleged title.' It cannot be denied that in the present case the parties are the same, and that the plaintiff is 'suing substantially by virtue of the same alleged title;' and therefore I think that the present case has been properly disposed of in accordance with that rule, which I apprehend is not in any respect confined to the Courts in England but applies as well to the Courts in Ireland, arising as it does out of the inherent power which resides in the Court to prevent a second suit being brought upon the same cause of action until the costs incurred in the first action have been paid. It is impossible for us to interfere with that which the Court of Appeal have done, which was entirely within their jurisdiction, and which I can see no reason to doubt has been right.

> My Lords, I come with the less regret to this conclusion because, as far as I can see, if the appellant here were allowed to sue he would really gain no advantage by doing so, for from all that I have heard today I have been unable to see that he would be likely to make out any sort of case against the present respondents, or to obtain any benefit from the litigation which he has commenced against them.
>
> I move your Lordships that the appeal be dismissed.

Both Lord Fitzgerald and Lord Macnaghten concurred with the speech of Lord Herschell. Lord Fitzgerald at p. 416 of the report stated the law in this way:

> My Lords, I concur in everything which my noble and learned friend on the woolsack has stated, and I should only add, from my experience of the practice in Ireland, where I was for a long time upon the bench, that as long as I can recollect it has been part of the inherent jurisdiction, and never doubted, of every Court in Ireland to stay proceedings in an action before it, where a prior action has been brought substantially asserting the same rights against the same parties in the same or another Court, until the costs of that prior action have been paid. It was quite a matter of course, and a part of the jurisdiction of the Court, and never quarreled with. That is exactly what the Master of the Rolls has done, and that is what the Court of Appeal has affirmed.

The Court of Appeal (Nourse, Balcombe, McCowan LJJ) in the case of *Hines v. Birkbeck College And Another (No. 2)* [1991] 3 WLR 557 vigorously applied the speech of Lord Herschell in *James M'Cabe (Pauper) v. The Governor And Company Of The Bank Of Ireland (supra)*. Writing for the Court of Appeal, Nourse LJ took extra pains to examine all the issues before him and, at p. 561 to p. 562, he had this to say:

> The three summonses were adjourned to the judge. In due course they were heard by Mervyn Davies J. On 30 March 1990 he made an order striking out the action as against both defendants on the ground of *res judicata*. In his judgment he dealt also with two further questions which would have arisen if he had allowed the action to proceed. He held that not only the plaintiff, but also the college and the university, were at liberty to refer a dispute of the visitor under section 206 (2) of the Education Reform Act 1988. He also held that each defendant would have been entitled to a stay until sums of 6,000 pounds and 7,500 pounds had been paid into court in respect of the costs which the plaintiff had been ordered to pay to the college and the university respectively in the first action. The plaintiff has appealed against the judge's decision of all three questions.

Nourse LJ rounded up the subject matter in style when he said at p. 565 to p. 566 of the report:

In regard to the third question, the factual position, as stated by Mervyn Davies J., was that the university had taxed its costs of the first action in May 1988 in the sum of 9,548.71 pounds and the college in September 1988 in the sum of 7,805.52 pounds; so that the total sum owing amounted to 17,354.23 pounds. However, the plaintiff did not attend the taxations and on 13 December 1989 he obtained an order setting aside the taxation certificates. When the matter was before Mervyn Davies J the hearing of the plaintiff's objections to the certificates had not been completed, so that the precise sums owing were unknown. On 10 August 1990 the costs were finally certified at 6,485.80 pounds in the case of the college and 8,236.98 pounds in the case of the university, as against the sums of 6,000 pounds and 7,500 pounds respectively which Mervyn Davies J would have ordered to be paid into court as the condition for the cesser of the stay. This development meant that it was no longer open to the plaintiff to argue in this court that there was no basis for ordering a stay of the second action until the costs of the first action had been taxed.

The authorities referred to by Mervyn Davies J included *Morton v. Palmer* [1882] 9 QBD 89; *Martin v. Beauchamp (Earl)* [1883] 25 Ch. D 12; *In re Wickham* [1887] 35 Ch. D 272 and *M'Cabe v. Bank of Ireland* [1889] 14 App. Cas. 413. The second and fourth of these were cases where the plaintiff, having failed in one action, brought a second action for the same matter. In *M'Cabe v. Bank of Ireland*, 14 App. Cas. 413, 415, Lord Herschell said:

> The only question remaining is whether the order was right in so far as it stayed the proceedings in the second action until the costs in the first action had been paid. Now, my Lords, I find that it was laid down in a recent case in the Court of Appeal, *Martin v. Earl Beauchamp* [1883] 25 Ch. D 12, 15, that 'the rule is established that where a plaintiff having failed in one action commences a second action for the same matter the second action must be stayed until the costs of the first action have been paid;' and even although the actions were not between precisely the same parties or persons suing in the same capacity, the case was held to be within the rule inasmuch as the plaintiff there was 'suing substantially by virtue of the same alleged title.'

Having cited that passage from Lord Herschell's speech, Mervyn Davies J said:

> In the light of *M'Cabe*'s case I conclude that when a plaintiff is ordered to pay the costs of an action and then brings a second action against the same defendant concerning the same subject matter then, on application by the defendant for a stay, the stay will be ordered as of course; unless no doubt there are some wholly exceptional circumstances I certainly see no exceptional circumstances in this case, so that it is appropriate to order a stay.

> Before this court the plaintiff sought to argue for a less stringent rule, for which purpose he relied mainly on *Morton v. Palmer*, 9 QBD 89 and *In re Wickham*, 35 Ch. D 272. However, each of those cases was concerned with the question whether a stay should be granted until the payment of costs which had been ordered to be paid in the same action. I can well see that a different rule may apply where there has been no final disposal of the action. That is not a state of affairs with which we are here concerned. *M'Cabe*, 14 App.Cas. 413 is clear and binding authority for the rule to be applied where an action has been finally disposed of and the costs of it have not been paid. In my view the judge correctly extracted the principle of that decision and it cannot be said that he erred in applying it to the present case. I would therefore affirm his decision of the third question.
>
> In the result I would not strike out the second action at this stage. To that extent I would allow the plaintiff's appeal. As at present advised, I would order that all further proceedings in the second action be stayed, as against the college until after the plaintiff shall have paid it the sum of 6,485.80 pounds and as against the university until after the plaintiff shall have paid it the sum of 8,236.98 pounds, in each case together with interest at the appropriate rate from whatever are the appropriate dates until the date of payment. I would give each defendant liberty to apply below if and when the action is no longer stayed as against the defendant. The precise terms of the order will be a matter for discussion with the parties after judgment has been delivered.

And Balcombe LJ together with McCowan LJ merely agreed and concurred.

At the local scene, the case of *Palaniappan v. Ramanathan & Ors* [1972] 1 MLJ 227 should be referred to. That was a case where the defendants applied:

(a) to stay all further proceedings in the suit until the plaintiff provided security for costs in the sum of $3,500 and had paid the first defendant all costs due and outstanding from him in civil suit no: 1138 of 1966 in the High Court at Kuala Lumpur and the appeal therefrom; and

(b) to strike out the suit on the grounds that it was frivolous and/or vexatious and/or was an abuse of the process of the court.

The defendants contended that civil suit no: 1138 of 1966 was substantially the same as the present action. It transpired that the plaintiff took no action to proceed with the matter and in February 1971 the defendants applied to have the suit dismissed for want of prosecution. The plaintiff did not object and an order was accordingly made on 22 March 1971. The court had to consider, in the main, whether the present action should or should

not be stayed until costs of the previous suit have been paid and whether an order requiring the plaintiff to provide security for costs should also be made. The court held that the effect of the dismissal of the previous action for want of prosecution did not bar the plaintiff from instituting a fresh action. The court also held that the principle that where the plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action had been paid, equally applies to a case where there is a dismissal of the action for want of prosecution, provided the second action is substantially for the same matter. In arriving at this decision, Abdul Hamid J (who later rose to be the Lord President of the Supreme Court) generously applied the principles as laid down in *Martin v. Earl Beauchamp (supra)* and *James M'Cabe (Pauper) v. The Governor And Company Of The Bank Of Ireland (supra)*. His Lordship further held that this was a proper case for an order that the plaintiff should provide security for costs. It would be ideal to reproduce the salient words of his Lordship. At p. 228 of the report in regard to the stay of the second action until the costs of the first action had been paid, this was what his Lordship Abdul Hamid J (who later rose to be the Lord President of the Supreme Court) had to say:

> Turning to the law, the necessary question that arises is under what circumstances will the court stay proceedings until costs of the previous action have been paid? Should the court also impose a time limit for the payment of those costs? Mr. Shankar counsel for the defendants cited to me *Martin v. Earl Beauchamp* [1884] 25 Ch. D 12 where Cotton LJ said at p. 15 that:
>
> > The rule is established that where a plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action have been paid.
>
> It would also appear from the judgment of Cotton, LJ that the position would still be the same even if the defendant in the second suit is only one of the defendants in the old suit. Although it would seem that in *Martin v. Earl Beauchamp, supra,* there was a failure of the first action whereas in the case under consideration there is a dismissal of action for want of prosecution, there is not the slightest doubt in my mind that the same principle would equally apply provided of course the second action is substantially for the same matter.

Martin v. Earl Beauchamp, supra, was approved in the House of Lords in *James M'cabe v. The Governor and Company of the Bank of Ireland* [1889] 14 App. Cas. 413. It was held that:

> Where a plaintiff having failed in one action brings in a second action for the same cause of action the second action must be stayed until the costs in the first have been paid.

At p. 415/416 Lord Herschell said:

> The only question remaining is whether the order was right in so far as it stayed the proceedings in the second action until the costs in the first action had been paid. Now, my Lords, I find that it was laid down in a recent case in the Court of Appeal, *Martin v. Earl Beauchamp* that 'the rule is established that where a plaintiff having failed in one action commences a second action for the same matter the second action must be stayed until the costs of the first action have been paid;' and even although the actions were not between precisely the same parties or persons suing in the same capacity, the case was held to be within the rule inasmuch as the plaintiff there was 'suing substantially by virtue of the same alleged title.' It cannot be denied that in the present case the parties are the same, and that the plaintiff is 'suing substantially by virtue of the same alleged title'; and therefore I think that the present case has been properly disposed of in accordance with that rule, which I apprehend is not in any respect confined to the courts in England but applies as well to the courts in Ireland, arising as it does out of the inherent power which resides in the court to prevent a second suit being brought upon the same cause of action until the costs incurred in the first action have been paid.

Across the causeway, the Singapore's Court of Appeal (Chua, Choor Singh and D'Cotta JJ) in *Mohan Singh v. Malkiyat Kaur* [1978] 2 MLJ 181 adopted the same kind of approach in regard to the appellant's second petition for divorce against the respondent. The brief facts of the case may be stated as follows. The appellant in that case filed a petition against the respondent for dissolution of marriage alleging that the respondent had deserted him without cause for a period of at least three years immediately preceding the presentation of the said petition. The court of first instance heard the petition in May 1974 and dismissed it with costs. The respondent's costs of the petition were duly taxed for the sum of $4,870 plus $203 for taxing fee and allocatur. The appellant had not paid the costs. On 7 July 1977, the appellant filed a second petition against the respondent for dissolution of marriage, alleging that the respondent had lived separately and apart from the appellant for a continuous period of at least seven years immediately preceding the presentation of the petition. The respondent took

out a summons asking that all further proceedings upon the second petition be stayed until the costs of the previous petition had been paid. The assistant registrar granted the respondent's application. The appellant appealed against the order of the assistant registrar to the judge in chambers and on 4 November 1977, the learned Chief Justice dismissed the appeal. The appellant appealed to the Court of Appeal. In dismissing the appeal, the Court of Appeal held that when a wife had to take proceedings against her husband or he against her she ought to be provided at his expense with the means of bringing the case before the court or of properly defending the case brought against her. Whether she was successful or not the rule was that the costs properly incurred in bringing her suit before the court, or in defending the attack made on her, ought to be paid by her husband. The Court of Appeal also held that it was right and in accordance with not only the practice of the divorce court but also of general judicial discretion that the wife should not be put to further trial without her costs of the first trial being paid. Chua J delivering the judgment of the Court of Appeal said at p. 181 to p. 182 of the report:

> Counsel for the appellant submitted that the common law principle is that an application to stay proceedings on the ground that the costs of the former suit were unpaid could not succeed unless the former suit was the same or substantially the same as in the suit in which the application was being made. It was submitted that the cause of action in the second petition was different from that in the first petition. In support of his submission counsel cited the cases of *Abdy v. Abdy* [1896] 12 LTR 524 and *Yeatman v. Yeatman* [1869] 39 LJ (P & M) 37.
>
> In the case of *Abdy v. Abdy* the wife first presented a petition for judicial separation on the ground of her husband's adultery. The petition was dismissed and the wife was ordered to pay certain costs which however were not paid and she filed another suit for judicial separation by reason of the husband's alleged desertion of her. The husband applied that further proceedings in the second suit be stayed until the costs of the former suit had been paid. Barnes J in his judgment said that it was clear from the case of *Yeatman v. Yeatman,* that an application to stay proceedings on the ground that the costs of a former suit were unpaid could not succeed, unless the cause of action in the former suit was the same as in the case in which the application was being made; that in this case the causes of action were not identical, for in the former suit the cause of action was adultery and in the present one desertion. The application to stay was refused.
>
> It is to be noted that in *Abdy v. Abdy* it was the wife who was the petitioner in both suits.

Yeatman v. Yeatman was overruled by the Court of Appeal in *Sanders v. Sanders* [1911] P 101.

The relation of husband and wife in matters of litigation in the Divorce Court is very special and very peculiar.

It is clear from the authorities that when a wife has to take proceedings against her husband or he against her she ought to be provided at his expense with the means of bringing the case before the court or of properly defending the case brought against her. In our view whether she is successful or not the rule is that the costs properly incurred in bringing her suit before the court, or in defending the attack made on her, ought to be paid by her husband. Every member of the Court of Appeal in *Kemp-Welch v. Kemp-Welch* [1910] P 233 adopted the view that Brett LJ (in the case of *Robertson v. Robertson* [1881] 6 PD 119) was perfectly right when he said it was a matter of high policy and high propriety that the husband should pay the wife's costs of defending a proceeding against her in the Divorce Court.

In the Divorce Court the wife is entitled to defend herself at her husband's expense. If he has not paid the wife's costs of the first petition she is put in greater difficulty in defending the second petition.

After referring to the case of *Silver v. Silver & Greenfell* [1924] P 163, 172, Chua J continued to say at the same page:

Counsel for the appellant also made the point that the learned Chief Justice had failed to take into consideration the appellant's inability to pay the costs of the previous proceedings as attributable to his misfortune rather than his fault. The short answer to this is that if he can find funds for himself for two suits he cannot escape the obligation of placing his wife in an equally favourable position.

We were of the view that there being in this case an order for payment of costs in the first suit, it is right and in accordance not only with the practice of the Divorce Court but also of general judicial discretion that the wife in the present case should not be put to further trial without her costs of the first trial being paid.

We accordingly dismissed the appeal with costs.

All these authorities are thought provoking and they serve as good guidelines. The stand of the defendant was quite clear. It was to stay enclosure one (1) until the issue of costs in the S2 matter has been determined and paid. Mr. Kuan Chee Foo, the learned counsel for the defendant, in style said that the defendant was not shutting the plaintiff of its right to foreclose under enclosure one (1). He submitted that it was the right of the defendant to be paid the costs in the S2 matter and that

the costs ought to be paid before enclosure one (1) was heard. I must put on record that I had kept an open mind in regard to enclosure one (1) and its adjudication will be put in abeyance until the defendant received its costs in the S2 matter.

Every lawyer in town is interested to be paid his costs. The defendant here is no exception. As a successful party in the S2 matter, the defendant was entitled to file an application to tax the costs against the plaintiff. Generally speaking the word "costs" would include a whole range of gamut like fees, charges, disbursements, expenses and remuneration (see O. 59 r. 1(1) of the RHC) that has been incurred by the party and this would necessarily include taxation proceedings as well.

The term "costs in the cause" would necessarily mean the costs of the proceedings that are to be awarded according to the final award of costs in the action. This was in fact the view of Lord Denning MR in *J.T. Stratford & Son Ltd v. Lindley (No. 2)* [1969] 3 All ER 1122 at 1123, [1969] 1 WLR 1547 at 1552 CA. According to Lord Denning MR in the same case, the words "plaintiff's costs" or "defendant's costs" would mean that the plaintiff or the defendant is entitled to have the costs of the interlocutory proceedings without waiting for the final outcome of the action. Lord Denning MR too said in the same case that the phrase "plaintiff's costs in any event" or "defendant's costs in any event" would mean that whoever wins or loses when the case is finally adjudicated after the hearing or settled, the plaintiff or the defendant is entitled to have the costs of those interlocutory proceedings. The court is vested with the power under O. 59 r. 4(1) of the RHC to expressly state that the costs are to be taxed and paid forthwith. Once the court has made that kind of an order, then the successful party has the right to tax the costs (*Adam & Harvey Ltd v. International Maritime Supplies Co Ltd* [1967] 1 All ER 533, [1967] 1 WLR 445, CA, and *Allied Collection Agencies Ltd v. Wood* [1981] 3 All ER 176).

The terminology "no order as to costs" simply mean that each party must bear its own costs (*Re Hodgkinson, Hodgkinson v. Hodgkinson* [1895] 2 Ch 190, CA). According to *British Natural Premium Provident Association v. Bywater* [1897] 2 Ch 531; *Beckley v. Colley* [1904] 48 Sol Jo 261; and *How v. Earl Winterton (No. 4)* [1904] 91 LT 763, the words "reserved costs" relate to costs which will not be allowed on taxation unless the court gives a specific order on the matter. And according to the case of *Gardner v. Marshall* [1845] 14 Sim 575, "reserved costs" will certainly not be included within the range of the "costs of the action".

The phrase "taxed costs" would mean that costs would be taxed in accordance with the taxation provisions as set out in the RHC. Order 59 r. 1(1) of the RHC states that:

> 'taxed costs' means costs taxed in accordance with this Order.

Whereas the phrase "fixed costs" would relate to costs that are determined in relation to the proceedings at hand and would always be governed by and to be computed according to the prescribed scales as set out in O. 59, Appendix 2 of the RHC. On the other hand, the terminology of "party and party costs" would refer to those costs which are considered "necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed" (see O. 59 r. 27(2) of the RHC). According to Malins VC in the case of *Smith v. Buller* [1875] LR 19 Eq 473 at 475:

> The costs chargeable under taxation between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries and must be paid by the party incurring them.

As I see it, under O. 59 r. 27 of the RHC "costs on the common fund basis" are generally better than "party and party costs". Even the case of *Gibbs v. Gibbs* [1952] 1 All ER 942 was of the view that "costs on the common fund basis" were more generous than "party and party costs."

The phrase "costs on an indemnity basis" would cover all those costs provided those costs would not have been unreasonably incurred (*EMI Records Ltd v. Ian Cameron Wallace Ltd* [1983] Ch 59, [1982] All ER 980). Finally, "solicitor and own client costs" would refer to the taxation of the solicitor's bill to his own client.

These digressions on the meaning of the word "costs" and its nomenclature would further show the anxiety of the defendant to have the costs in the S2 matter to be paid first before enclosure one (1) could proceed. Indeed this seemed to be the tenor of the submissions of Mr. Kuan Chee Foo. Undaunted, Mr. Wong Ming, the learned counsel for the plaintiff, referred to the case of *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram (No. 2)* [2002] 1 CLJ 609 and submitted that the submissions of Mr. Kuan Chee Foo were nothing more than "legal manoeuvrings" designed to shackle the plaintiff. With respect, the submissions of Mr. Kuan Chee Foo were sound and stood on solid legal authorities. In my judgment, the defendant had shown special circumstances to warrant a stay of enclosure one (1) pending the disposal of the issue of costs in the S2 matter. For all these reasons, I allowed encl. 9 forthwith.